Supreme Court, U. S.
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IN THE

Supreme Court of the United States

NO. 78-1160

THE HARPSTER BANK,
Appellee,

v.

THEODORE R. SAKER, *et al.*,
Appellants.

APPEAL FROM THE
SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

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IN THE

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NO.

THE HARPSTER BANK,
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v.

THEODORE R. SAKER, *et al.*,
Appellants.

APPEAL FROM THE
SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

STATEMENT OF THE CASE

This matter began as a foreclosure action in the Franklin County, (Columbus), Ohio, Common Pleas Court. The matter was terminated upon the court granting a motion for summary judgment and disallowing a trial upon the answer and counterclaim of defendants (appellants herein.) (App. A.)

Upon appeal to the Franklin County (Ohio Tenth Appellate District) Court of Appeals, two of three assignments of error were sustained. (App. B.) The issue resolved against appellants is the question taken to the Ohio Supreme Court and is the proposition of law raised by the within appeal. The Supreme Court of Ohio did not admit the case on its

merits (App. C.) and it is from the decision of that court not to rehear the motion for leave to appeal that brings the case to this court.

STATEMENT OF FACTS

Appellants borrowed money from the appellee; at a later time, the debt was restructured with additional collateral supplied to appellee. A more detailed factual background is supplied in Appendix D. Appellee liquidated assets of appellants on a basis that benefitted individuals in control of appellee, to the detriment of appellee, its ultimate shareholders and to the detriment of appellants. When appellee filed this action originally, it had other actions pending which it resolved on a basis to please other individuals and, again, to its own detriment. Appellants sought to raise the issues of the conduct of appellee and the other parties involved in the sacrificial liquidation of appellants' assets.

PROPOSITIONS OF LAW INVOLVED

1. In a suit by a mortgagee against a mortgagor to obtain a sale of mortgaged premises, the mortgagee may set up a counterclaim for damages for fraud practiced by the mortgagee. (Syllabubus in *Allen v. Shackelton*, 15 Ohio St. 145, restated in the light of the facts of the present case.)

2. It is the general rule that when equity takes jurisdiction of a case, it will draw to itself all matters necessary to a final disposition of the controversy, retain jurisdiction for all purposes, decide all issues which are involved in the subject matter of the dispute between the litigants and award relief which is complete and finally disposes of the litigation so as to accomplish full justice between the parties litigant, and *prevent future litigation. Katchen v. Landy*, 382 U.S. 323; *Hepburn v. Dunlop*, 1 Wheat 179; *Pease v. Rathbun-Jones Engineering Co.*, 243 U.S. 273.

JURISDICTIONAL STATEMENT

The trial court in this case indicated that appellants might seek what relief may be available to them in a separate action. The injustice arises from the possibility that the appellants, given their day in court upon their counter claim, may obtain a judgment that exceeds whatever amount may be due and owing to the appellee. In the light of that possibility, should appellee be permitted to obtain resolution of its case without the claim of the appellants being heard in the same action? If that is permitted, then the result may well be to permit the appellee to perpetrate further damage to appellants whose day in court will not be timely as it relates to defending themselves adequately against the wrongs committed by appellee and its co-conspirators.

This court decided many years ago that where the court has jurisdiction of a part involving the principles upon which the whole depends, the whole controversy will be settled. *Massie v. Watts*, 6 Cranch 148; 3 L. ed. 181.

The breadth of the applicability of this principle may be discerned in the case wherein a utility rate was in issue yet the court undertook to decide a question as to the type of fuel (natural or synthetic gas) might be used. *Iowa City v. Iowa City Light & Power Co.*, 90 F2d 679; 112 ALR 618.

This principle has been the foundation for courts going outside equity and acting upon questions normally in actions at law so as to avoid multiplicity of actions and deciding all issues. *Camp v. Boyd*, 229 U.S. 530; 57 L. ed. 1317.

In *Big Six Development Co. v. Mitchell*, 138 F. 279; cert. den. 199 U.S. 606; 50 L. ed. 330, it was held that to avoid circuity of action, a court of equity on the filing of a bill for a purpose clearly cognizable in equity, may and usually will proceed to take jurisdiction of all the matters in controversy

between the parties, whether they are of a legal or equitable character, instead of sending them to a court of law. In *Walden v. Bodley*, 14 Pet 156; 10 L. ed 398, it was held that it was compelling that one who can file a cross bill ought to do so; otherwise, he may lose his right to relief by reason of the fact that the court, having jurisdiction of the original suit, may refuse to entertain an original bill which may subsequently be filed by the defendant on the principle that the whole controversy should have been considered and determined in the first suit.

By coincidence, this court decided a case in 1944 concerning the foreclosure of lands in two counties adjacent to Franklin County, Columbus, Ohio. In *Crites, Inc., v. Prudential Insurance Company*, 322 U.S. 408; 88 L. ed. 1356, the court soundly rebuked misconduct on the part of a receiver in a foreclosure case. In this case, property was sold for less than the amount of the mortgage debt and less than the appraised value of the property. In the within case, the appellee in conspiracy with other parties, undertook to sell property of appellants for far less than its market value and in an arrangement whereby the parties having control of the appellee bank would be able to acquire said assets of appellants for one-fifth to one-tenth of their value. One party, Van Olnhausen, president of the holding company that owned 99% of the shares of appellee bank, purchased shares in a company owning a television station for $14,000.00. This was done by private negotiation with appellee bank whose officers and directors owed their position to the voting done by the said Olnhausen. Said television shares had been owned by appellants and had been given as collateral to appellee. Said shares represented one-ninth of the television station company and had a reasonable market value five to eight times the price paid by Olnhausen. Since Olnhausen had a fiduciary relationship to appellee, should not the profits realized by him be disgorged as required in *Crites* (p. 414 of the opinion) and under principles of law supported in *Michoud v. Girod*, 4

How. 503; 13 L. ed. 1076; *Magruder v. Drury*, 59 L. ed. 151; and *Jackson v. Smith*, 254 U.S. 586; 65 L. ed. 418.

It is respectfully submitted that the courts below erred in not permitting the appellants to pursue their counterclaim in the same action as was brought by appellee.

Respectfully,

THEODORE R. SAKER, Esq.
Theodore R. Saker Co., L.P.A.
3887 Indianola Avenue
Columbus, Ohio 43214
Attorney for Appellants

APPENDIX A

COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO

THE HARPSTER BANK, Plaintiff,	:	
—vs—	:	Case No. 77CV-01-429
THEODORE R. SAKER, Et al., Defendants.	:	

DECISION

Rendered this 25th day of July, 1977.

MARTIN, J.

This matter is presently before the Court on the motions for summary judgment which were filed by the Plaintiff on April 29, 1977, and May 27, 1977.

It appears that non-oral hearing dates were set as to these motions and that no responsive memoranda or affidavits were filed by the Defendants, Theodore R. Saker or Patricia A. Saker. Civil Rule 56 provides that ". . . an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set for specific facts showing that there is a genuine issue for trial." The lack of response by the defendant Sakers leads this Court to find that there is no genuine issue of material fact and that Plaintiff is entitled to judgment as a matter of law. Plaintiff's motions are, therefore, SUSTAINED.

Plaintiff's counsel is to prepare and submit a Judgment Entry pursuant to Court Rule 39.01.

/s/ Paul W. Martin

PAUL W. MARTIN, Judge

APPEARANCES:

James R. Moats
Attorney for Plaintiff

Theodore R. Saker
Attorney for Defendants Patricia
A. Saker & Theodore R. Saker

APPENDIX B

IN THE COURT OF APPEALS
OF FRANKLIN COUNTY, OHIO

The Harpster Bank, Plaintiff-Appellee,	:	
v.	:	No. 77AP-840
	:	
Theodore R. Saker and	:	
Patricia A. Saker,	:	
Defendants-Appellants,	:	
and	:	
	:	
City National Bank and	:	
Trust Company, et al.,	:	
Defendants-Appellees.	:	

DECISION
Rendered on May 25, 1978

KINCAID, PALMER AND RANDALL,
MR. JAMES R. MOATS, of Counsel,
155 East Broad Street,
Columbus, Ohio 43215,
For Plaintiff-Appellee.

THEODORE R. SAKER CO., L.P.A.,
MR. THEODORE R. SAKER, and
MR. JEROME D. CANTANZARO, of Counsel,
3887 Indianola Avenue,
Columbus, Ohio 43214,
For Defendants-Appellants.

WHITESIDE, J.

Defendants Theodore and Patricia Saker appeal from a judgment of the Franklin County Court of Common Pleas and raise three assignments of error, as follows:

> "1. The court erred in granting summary judgment to plaintiff.
>
> "2. The court erred in disallowing the counterclaim of defendants-appellants.
>
> "3. The court erred in failing to determine the amount of the judgment when said amount changed as a result of plaintiff disposing of assets of defendants-appellants lis pendens."

By its complaint, plaintiff alleges that, on March 15, 1976, it recovered a judgment against defendants Theodore and Patricia Saker in the Common Pleas Court of Wyandot County in the amount of $229,445 plus interest and costs and allege that, by virtue of a certificate of judgment, it has a lien against certain property owned by defendant Patricia Saker. The complaint further alleged that there remains due on said judgment the sum of $198,832.27 plus interest at 8 percent from May 27, 1976. The complaint further alleges that the remaining defendants may have an interest in the property owned by defendant Patricia Saker. Defendant Theodore Saker filed an answer denying all the allegations of the complaint.

On April 29, 1977, defendant Patricia Saker not having answered, plaintiff filed a motion for default judgment against her, and at the same time filed a motion for summary judgment against defendant Theodore Saker supported by an affidavit stating that there was then due on the judgment against defendant Saker the sum of $202,457.46 plus interest at 8 percent from April 15, 1977. On May 6, 1977, defendant Patrica Saker filed her answer together with a motion for leave to file same instanter. That answer

denies every allegation of the complaint but states that the Wyandot County judgment was for an amount substantially higher than it should have been. The answer further alleges that the amount due plaintiff is a substantially lesser sum than set forth in the affidavit attached to the motion for summary judgment previously filed by plaintiff. The answer further alleges that plaintiff is not the true party in interest.

On July 25, 1977, the trial court rendered a decision sustaining plaintiff's motion for summary judgment as against defendants Theodore and Patricia Saker, indicating that no responsive memoranda or affidavits were filed by them.

On August 1, 1977, defendant Patricia Saker filed an affidavit stating that the balance due claimed by plaintiff is incorrect, stating that the Wyandot County judgment reflected an incorrect amount and that the affidavit submitted in support of the motion for summary judgment is also incorrect as to the amount due. On the same day, defendant Theodore Saker filed a cross-complaint attempting to join additional defendants, and summons was issued thereon.

On August 4, 1977, a judgment entry was entered which was not signed by the judge assigned to the case and who rendered the decision but, instead, was signed by another judge of the trial court with an indication of "duty judge," but no other indication as to why the assigned judge did not sign the entry. This entry went far beyond the summary judgment previously granted by decision and rendered judgment with respect to all other defendants in the case, finding them to have an interest in certain property owned by defendant Patricia Saker, even though no proceedings had been had with respect thereto, and no decision rendered. However, defendants Theodore and Patricia Saker raise no issue on appeal as to any error in connection with

the entering of this judgment other than as relates to the summary judgment against them in favor of plaintiff. The judgment entry, rather than entering judgment in the amount stated in the affidavit upon which the summary judgment was predicated, entered judgment in the approximate amount originally prayed for; namely, the sum of $198,799.51 plus interest at 8 percent from May 27, 1976.

On August 16, 1977, defendants Theodore and Patricia Saker filed a motion for a new trial, for stay of execution, and/or to vacate judgment. This motion was supported by another affidavit of Patricia Saker, stating that plaintiff had sold assets pledged to it and had recovered at least $10,000 which had not been credited towards the Wyandot County judgment, and that at least an additional $15,000 should be credited because of another transaction.

On August 22, 1977, defendants Saker filed a motion to amend their counterclaim and filed the amended counterclaim. On September 14, 1977, the trial court rendered a decision overruling defendant's motion for leave to file an amended counterclaim upon the grounds that it could appropriately be considered in a separate action. On October 14, 1977, the trial court rendered a decision overruling defendants' motion for a new trial for stay of execution or to vacate judgment, which was journalized by entry on December 20, 1977.

At the oral hearing of this case, it became apparent that the record on appeal contains no motion for summary judgment as against defendant Patricia Saker, even though the trial court purported to sustain the motion against her. Subsequently, plaintiff filed a motion in this court for leave to submit a motion to the trial court to correct the record pursuant to Civ. R. 60(A), which was sustained by this court by entry of April 12, 1978, stating:

> "* * * if the trial court finds that such parts were omitted from the docket, said court shall proceed as provided for by Civil Rule 60(A) and State Appellate Rule 9(E) * * *."

On April 19, 1978, a supplemental record was transmitted to this court, but such supplemental record does not contain any action of the trial court in accordance with the entry of April 12, 1978. Rather, a new certified docket entry indicating the date of May 27, 1977, was submitted, stating:

> "Motion for summary judgment of pltff, The Harpster Bank, as to Patricia A. Saker (filed under case number 77CV-01-492, corrected to 77CV-01-429)."

Accompanying the certified docket entry was a motion for summary judgment clearly indicating that it was to be filed in case No. 77CV-01-492, although the case number of this case in the trial court was 77CV-01-429. The memorandum in support of that motion for summary judgment which was not filed in this case in the trial court until sometime in April, 1978, after the oral argument herein, makes varying references to agreements of the parties as to the amount of the Wyandot County judgment and refers to an affidavit attached. No such affidavit is attached, nor is there any indication as to whether or not defendant Patricia Saker filed anything in response under the case number indicated on the motion, although defendant Saker has made no such intention. In short, none of the statements contained in the memorandum in support of the motion for summary judgment are supported by affidavit or otherwise, other than the affidavit filed in connection with the motion for summary judgment against defendant Theodore Saker. The memorandum does state that, in that affidavit, the original amount prayed for has been increased by the addition of interest and reduced by the receipt of proceeds

from the sale of certain common stock. Nevertheless, judgment was entered by the trial court for the amount originally prayed for in the complaint.

The entry of this court allowing a supplemental record to be filed pursuant to App. R. 9(E) required as a prerequisite a determination by the trial court as to whether or not the motion was properly before that court at the time of the rendition of judgment and had inadvertently been omitted from the docket and record by the clerk. No such findings have been made, or at least have not been forwarded to this court. See *State v. Robinson* (1978), 53 Ohio St. 2d 211. More importantly, what has been submitted clearly indicates that the motion for summary judgment as against defendant Patricia Saker was not properly before the trial court at that time because it had been filed by plaintiff in a different case, at least under a different case number, and docketed in that case. The motion was not docketed in this case until sometime in April, 1978.

The basic claims of defendants Saker as raised by the first and third assignments of error is not that there is not a sum due to plaintiff from them pursuant to the Wyandot County judgment but, rather, the amount claimed and the amount for which judgment was entered exceeds the amount due. Since the first and third assignments of error both relate to this claim, they will be considered together.

First, as indicated above, it is apparent that the motion for summary judgment as against Patricia Saker was not properly filed and, accordingly, was not properly before the trial court at the time of the rendition of judgment against her.

Secondly, and equally if not more important, it is apparent from the face of the record that the amount of the judgment is inaccurate. The complaint alleged that there remained due on the Wyandot County judgment the sum of $198,832.27 plus interest at 8 percent from May 27, 1976.

Judgement was rendered on August 4, 1977, for $198,799.51. Such judgment, including interest to August 4, 1977, would amount to approximately $217,663. However, the affidavit in support of the motion for summary judgment against defendant Theodore Saker indicates that the amount due is $202,457.46 plus interest from April 15, 1977, which as of August 4, 1977, would with interest amount to approximately $207,361.00. Thus, there is an approximate $10,000 difference, the amount claimed by the affidavit of defendant Patricia Saker filed on August 1, 1977. Furthermore, the memorandum in support of the motion for summary judgment against defendant Theodore Saker expressly states that the original amounts prayed for have been reduced by the sale of certain common stock. Accordingly, it would appear that the amount stated in the affidavit as being due would include interest, as well as the original judgment. Since interest is not computed on the interest, the correct computation for interest would of necessity be on the remaining unpaid balance of the judgment.

The trial court did not require that the proper arithmetical calculations be made so that judgment could be rendered in the appropriate amount, the remaining unpaid balance of the judgment plus interest, without awarding interest upon interest, and compounded the error by entering judgment in excess of the amount which the affidavit in support of the motion for summary judgment stated to be due. Accordingly, the first and third assignments of error are well taken.

By the second assignment of error, defendants contend that the trial court erred in disallowing their counterclaim. Since the trial court found that the counterclaim could be filed as a separate suit, and since additional parties are named therein, we find no prejudicial error in this regard. Defendants Saker remain free to file the substance of their counterclaim in a separate action in accordance with the

ruling of the trial court. Accordingly, the second assignment of error is not well taken.

For the foregoing reasons, the first and third assignments of error are sustained, and the second assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law consistent with this decision.

Judgment reversed and remand.

STRAUSBAUGH and REILLY, JJ., concur.

APPENDIX C

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,)
City of Columbus.) *1978 TERM*

To wit: October 26, 1978

The Harpster Bank,	:	
Appellee,	:	
vs.	:	No. 78-892
	:	**REHEARING**
Theodore R. Saker et al.,	:	
Appellants.	)	

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, of Clerk the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. _____ Page ____
IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 26th day of October, 1978.
THOMAS L. STARTZMAN, *Clerk.*
By ..... *Deputy.*

APPENDIX D

FACTUAL BACKGROUND OF THE CASE

In 1960 and 1961, Theodore R. Saker while serving in the office of the Attorney General of Ohio, and while advising and counselling the Ohio Superintendent of Banks, discerned the difficulties inherent in small banks located in rural communities. He perceived the substantial differences in the quality and variety of services being offered to bank customers in the larger cities as opposed to bank customers in farm communities.

Extensive research was made into the bank holding company act. After leaving his position as the First Assistant Attorney General of the State of Ohio in January, 1963, Mr. Saker undertook the research into the areas of banks that may be available for purchase. In October, 1964, he entered into an agreement to acquire the shares of the Adelphi Banking Company located in Ross County, approximately 45 miles southeast of Columbus. He arranged the financing for this acquisition which required the sum of $135,000.00. He persuaded a group of people to join him in the acquisition of these bank shares.

The situation remained fairly dormant until the summer of 1966. Mr. Saker was then requested by the members of the group to form a corporation which would serve as a holding company. This was done on August 10, 1966. The holding company was named American Bancorporation.

The company went public for the first time, offering its shares for sale for cash as well as offering its shares in exchange for the stock of the Adelphi Bank. The offering, totaling $200,000.00 for both types of sales, was fully successful in approximately 60 days.

In March, 1967, the company entered into an agreement to acquire the shares of the Harpster Bank, the herein appellant. Harpster is a small town located approximately 60

miles north of Columbus. This placed the company under the provisions of the Federal Bank Holding Company Act. Mr. Saker then had his first meeting with Harry W. Huning, Vice-President, Federal Reserve Bank of Cleveland. From that day up until the present time, Mr. Huning conducted a campaign of hostility, opposition, destructive tactics, gossiping, back-biting, and in general, total and unremitting opposition to the efforts of Mr. Saker and the holding company.

It took from April of 1966 to October of that year before Mr. Huning allowed the application to go to Washington for consideration by the Board of Governors as to the permission sought by the company to acquire the Harpster Bank.

In January, 1967, Mr. Saker was called to Washington by staff members of the Board of Governors and was told that such an acquisition would not be considered on the basis of debt financing which was to be later retired by the proceeds of an issue of common stock. Instead, the offering would first have to be accomplished before the plan would be deemed feasible. Mr. Saker returned to Columbus and a second public offering of shares of American Bancorporation was launched on February 28, 1968. This offering was completely sold out by December 6, 1968. In the meantime, however, the agreement to purchase said shares was about to lapse in July, 1968. Because of the attitude and conduct of Mr. Huning, the sources of financing became extremely limited but finally the contract was consummated and the shares were acquired by Mr. Saker on July 5, 1968, in the same method he had employed in acquiring the shares of the first bank.

Upon the success of the second public offering, which generated $600,000.00, and upon this event being reported to the Board of Governors, the application of American Bancorporation to become a bank holding company and to

acquire its second affiliate was approved on January 29, 1969.

In March, 1969, Mr. Saker learned of the great distress being experienced by the Huntsville State Bank, located in the village of Huntsville, approximately 55 miles northwest of Columbus. Prior management had made a series of unfortunate loans which had wiped out the capital of the bank. Recapitalization efforts were meager but, nonetheless, Mr. Saker entered into an agreement to acquire the shares of said bank and did so. Once again, Mr. Huning undertook such steps as were best designed to cripple and frustrate Mr. Saker's efforts. Nevertheless, the application to acquire the Huntsville State Bank was finally approved and another public offering whereby an exchange of shares of the holding company stock with shares of the bank was fully successful.

In the meantime, and for the third time, Mr. Saker incurred tremendous debt as a personal liability in order to acquire these banks and, once again, the holding company generated the capital with which to retire said debts and acquire the banks. In each of these transactions, Mr. Saker very carefully avoided any profit or even reimbursement for his expenses in the course of his efforts. Up to this point, Mr. Saker did not even draw a salary from the holding company.

In the fall of 1970, Mr. Saker learned of another bank in great distress: the Dime Saving Society in Marietta, located approximately 130 miles southeast of Columbus. Once again, poor management, poor location and other adversities not only saw this institution operating at a loss but also were causing a diminution of its deposits.

Mr. Saker learned that another Bank had proposed to acquire the Dime Saving Society by merger and to keep its capital which had a balance of approximately $225,000.00.

However, said merger did not occur because of the fear of the part of the surviving bank for the difficulties involved. Mr. Saker also learned that the directors of the Dime Savings Society had attempted to recapitalize but withdrew the proposal when they were advised that their attorneys fees would run somewhere between $50,000.00 and $100,000.00. Mr. Saker proposed to the Dime Savings Society that it become an affiliate of American Bancorporation, that it become a full service commercial bank and that the holding company would not take any of the capital funds which could be distributed to the depositors.

Regulatory approval was obtained by Mr. Saker to move the location of the institution from a dismal, second floor office in an unattractive location of the city to a first class, first floor location across from the Courthouse and at the main intersection of the town. At no expense to the institution, Mr. Saker undertook all of the regulatory work to convert it into a full service commercial bank. Mr. Saker also undertook the necessary capitalization necessary to implement the granting of the bank charter. Finally, the affiliation with the American Bancorporation was approved by the Board of Governors and the affiliation was established on May 1, 1972. In the meantime, and for the fourth time, Mr. Saker had undertaken as personal debt, the generating of the funds necessary to provide capital required by the regulators for the continued existence of the Dime Savings Society.

The fifth bank to become an affiliate of American Bancorporation was the Continental Bank, located about 20 miles north of Lima, Ohio. Mr. Saker persuaded an associate to acquire said bank which was in great regulatory distress. The affiliation was accomplished in the basis of an exchange of shares of the holding company stock where the shares of the bank which had been acquired by the associate of Mr. Saker.

The sixth affiliate bank was the Farmers State Bank of McClure, located approximately 20 miles southwest of Toledo, Ohio. Mr. Saker once again undertook a substantial debt as his personal liability in order to acquire the shares of this bank. The affiliation was approved by the Board of Governors on the basis of the exchange of the bank shares by Mr. Saker for preferred shares of the holding company which were to be retired in a later public offering.

In 1972, Mr. Saker entered into agreements so as to acquire the shares of three banks: The Morristown Bank, now known as the Eastern Ohio Bank, located approximately 20 miles west of Wheeling, West Virginia; The Miami Valley Bank, located approximately 20 miles south of the Huntsville State Bank and The Harrisburg Bank, located 18 miles south of Columbus, Ohio.

Mr. Saker also became involved to the extent of being a co-signer for one of the notes in connection with the acquisition of the Citizens Savings and Loan Company, located in downtown Columbus, Ohio.

American Bancorporation then launched the following programs: the merger of the Miami Valley Bank with the Huntsville State Bank was proposed; the affiliation of the Eastern Ohio Bank with the American Bancorporation was proposed; the merger of the Citizens Savings and Loan Company into the Harrisburg Bank, now called the American Bank of Central Ohio, was proposed together with the affiliation of the resulting institution with the holding company, American Bancorporation.

All of this went forward in the early part of 1973 in the face of the continued hostility and bitterness of Harry W. Huning. In October, 1973, a mortal blow was struck by the Ohio Superintendent of Banks who was under the domination of Harry W. Huning and who filed an objection to the regulatory efforts of American Bancorporation. It

took six months of grief and nonsense to get rid of the objection and the Ohio Superintendent of Banks ended up with a cushy job with one of Harry Huning's pet banks in Cleveland.

It was not until September, 1974, that American Bancorporation was able to launch its public offering and despite the terrible economic circumstances of the times, 440,000 shares of American Bancorporation stock were sold for gross proceeds of $2,200,000.00 by the end of 1975.

In the meantime, however, the debt service which Mr. Saker had to carry between 1974 and 1976 became staggering. The prime rate practically doubled from six to twelve percent in that period of time. The funds being generated could not be used pending the regulatory approvals.

At that point, James J. Hughes Jr., then Law Director of the City of Columbus, and planning to go into private practice, undertook to destroy Mr. Saker and his program. He persuaded other directors who were serving on the boards of the holding company as well as the American Bank of Central Ohio, to oust Mr. Saker as the Chief Executive Officer of the American Bank of Central Ohio. This Mr. Hughes did in the face of the fact that he had placed extremely sick loans at the American Bank of Central Ohio. One of such loans was to a person who bought a boat from Mr. Hughes for $25,000.00 and the funds were paid to Mr. Hughes as a result of the loan which Mr. Hughes procured at the bank. After making one or two payments, the purchaser of the boat took the boat to Florida and was never seen again. The boat was not recovered until many years later and many hundreds of dollars of expense involved.

As a matter of fact, because of the improvident conduct of Mr. Hughes and other directors at the American Bank of Central Ohio, Mr. Saker returned to the Board of Directors of that Bank, and ultimately became its Chief Executive

Officer because of the mismanagement which was causing great regulatory concern. Mr. Saker undertook to provide capital funds for the American Bank of Central Ohio from the resources of the holding company.

Mr. Hughes struck his blow on January 26, 1976, by way of a special meeting of the board of directors. A majority of the directors voted for the ouster of Mr. Saker. Refusing to join in this effort was Harry Blythe, a renowned professor of Money and Banking at the Ohio State University, and a distinguished lecturer in the banking community across the United States. Dr. Blythe attempted repeatedly to obtain from Mr. Hughes the reason for his conduct but was unable to do so. It was apparent then and has become abundantly clear that Mr. Hughes, whose law firm extracted legal fees of approximately $175,000.00 in the ensuing period from said bank, that he seized control of the bank in order to pick up a fat client.

Mr. Huning quickly seized the opportunity and was obviously able to use the assassination of Mr. Saker by Mr. Hughes as a basis to obtain an order from the Board of Governors aimed at Mr. Saker. Mr. Huning then invited himself to a meeting of the Board of Directors of American Bancorporation and brought in all of the other regulatory authorities and Mr. Saker agreed to the cease and desist order of the Board of Governors.

At that point, Van Olnhausen, President of the Dime Bank of Marietta, together with other directors of the American Bancorporation, conversed with Mr. Huning and the result was the forced resignation of Mr. Saker as an officer of American Bancorporation.

Mr. Hughes and Mr. Olnhausen joined forces with Mr. Huning in order to begin the utter liquidation of all of Mr. Saker's assets. Mr. Olnhausen committed constructive embezzlement by arranging to buy the shares that Mr. Saker owned in a corporation which owned the television broad-

casting station in Parkersburg, West Virginia. Mr. Hughes accomplished the capture of Mr. Saker's interest in a farm in behalf of a client at a price of approximately 20 percent of that figure to which Mr. Hughes' client had agreed approximately a year before. One after another, all of Mr. Saker's assets were liquidated on a basis of total advantage to Mr. Hughes, Mr. Olnhausen and their co-conspirators.

Guess who ended up owning the American Bank of Central Ohio? Yes, it was Mr. Hughes and a new group which he organized. Under Huning's aegis Mr. Hughes made a deal with the Winters National Bank and Trust Company so as to be able to acquire said shares at an advantageous price and far below the amount of debt due upon said shares.

Finally, coming to the facts of this case, the Harpster Bank filed an action to foreclose the judgment it obtained on a cognovit note. The Harpster Bank also filed a foreclosure against a piece of real property, having obtained a mortgage on said real property from Mr. Saker. Said mortgage was a branch bank owned by a company in which Mr. Saker was the sole shareholder. Mr. Hughes, representing American Bank of Central Ohio, swapped a judgment which that bank had against Mr. Saker for the mortgage which the Harpster Bank had on the branch office of the American Bank of Central Ohio. The effect of this transaction was to eliminate a mortgage debt of a $186,000.00 which was the face amount of said mortgage payable to the Harpster Bank which took instead, a judgment with a balance of approximately $15,000.00.

In the meantime, Mr. Hughes retained the collateral securing the debt owed to the American Bank of Central Ohio by Mr. Saker consisting, among other things, of a 6,020 shares of American Bancorporation. Mr. Hughes then accomplished a sweetheart sale of said shares to one of his co-conspirators, Roger Cloud, and attempted to conceal the transaction by laundering it by way of a sale to a stock-

broker firm of said shares and on the same date, said shares were sold to Roger Cloud by said stock broker firm.

The Harpster Bank, in its foreclosure case, up to this point, has been able to avoid the requirement of justice as to responding in damages for the nefarious activities in which it has been involved with Mr. Hughes, Mr. Olnhausen and others for their personal advantage and benefit and to the detriment of the Harpster Bank and to the shareholders of the American Bancorporation which once owned the Harpster Bank. It so happens that in July, 1978, American Bancorporation sold the Harpster Bank.

The Adelphi Banking Company, now known as the Ross County National Bank, had approximately $1,100,000.00 in assets when Mr. Saker acquired it. Today its assets are in the area of $7,000,000.00.

The Harpster Bank which had $4,000,000.00 in assets at the time that Mr. Saker acquired it, had assets of about $9,000,000.00 at the time that it was sold in 1978.

The Huntsville State Bank had $3,000,000.00 in assets when Mr. Saker acquired it and today it is in the area of $10,000,000.00 in assets.

The Dime Savings Society, now the Dime Bank, had four million in assets when Mr. Saker rescued it and, today, its assets are nearing $17 million.

The Continental Bank of McClure had assets of $5 million when Mr. Saker acquired it and today has assets well over double that amount.

American Bancorporation, formed by Mr. Saker, began at a zero point in 1966 and, at the point of his departure from it, had assets in excess of $60 million.

The corrupt and unlawful conduct of Mr. Hughes, Mr. Olnhausen and Mr. Huning and their weak-kneed allies

might well qualify this story to opt Dreiser's title, "The American Tragedy." However, fortunately, the story is far from complete and is not remotely ready to be labelled and tagged a success or failure.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 78-1160

THEODORE R. SAKER, *et al.*,
Appellants,

v.

THE HARPSTER BANK,
Appellee.

MOTION TO DISMISS APPEAL

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MOTION TO DISMISS APPEAL

The Harpster Bank, appellee herein, respectfully moves this Court for an order dismissing the appeal on the ground that the appeal is not within the jurisdiction of this Court, because not taken in conformity to statute or to the rules of this Court.

This motion is based on the fact that the appellant has indicated in his Notice of Appeal that this appeal is being taken pursuant to 28 USC Section 1257 (2), but no where in his Jurisdictional Statement does he specify the particular Ohio statute the validity of which is being questioned on the ground of its being repugnant to the Constitution, treaties or laws of the United States.

In addition, the appellant fails to include within his Jurisdictional Statement most of the material required by Rule 15 of this Court.

In his Notice of Appeal, the appellant states on page one that his appeal is taken pursuant to 28 USC §1257 (2). That particular section provides as follows:

> Section 1257. State courts; appeal; certiorari
>
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

In this case, no Ohio statute was ever drawn into question at any level of the proceedings. The appellant has failed to set forth for this Court the particular Ohio statute which he contends is drawn into question. Indeed, he cannot do this because no such ground has been presented to or considered by the Courts of the State of Ohio. Accordingly, this Court has no jurisdiction of this suit. *Michigan Cent. R. Co. v. Michigan Southern R. Co.*, Mich. 1857, 60 U.S. 378, 19 How. 378, 15 L. Ed. 689; *Murdock v. Memphis, Tenn.*, 1875, 87 U.S. 590, 20 Wall. 590, 22 L. Ed. 429; *Adams v. Preston*, La. 1860, 63 U.S. 473, 22 How. 473, 16 L. Ed. 273.

In addition, the appellant's Jurisdictional Statement fails to comply with the very specific commands of Rule 15 of this Court. Specifically, the Jurisdictional Statement does not comply with the following mandates:

1. The jurisdictional statement required by paragraph 2 of Rule 13 shall contain in the order here indicated —

(b) A concise statement of the grounds on which the jurisdiction of this Court is invoked, showing:

(i) The nature of the proceeding and the statute pursuant to which it is brought;

(ii) . . .

(iii) The statutory provision believed to confer on this Court jurisdiction of the appeal;

(iv) Cases believed to sustain the jurisdiction;

(v) If the validity of the statute of a state, or statute or treaty of the United States is involved, its text shall be set out verbatim, citing the volume and page where it may be found in the official citation. . . .

(d) . . .

If the appeal is from a state court, the statement of the case shall also specify the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised . . .

(e) If the appeal is from a state court, there shall be included a presentation of the grounds upon which it is contended that the federal questions are substantial, which shall show that the nature of the case and of the rulings of the court was such as to bring the case within the jurisdictional guidelines relied on.

(j) There shall be appended to the statement a copy of the Notice of Appeal showing the date it was filed and the name of the court where it was filed.

Even a cursory examination of the Jurisdictional Statement indicates that the appellant has omitted all of the required information listed above.

The appellant has failed to establish or even assert the basis for this Court having jurisdiction under 28 USC Section 1257 (2). His Jurisdictional Statement materially fails to comply with the requirements of Rule 15 of this Court. Furthermore, he submits nothing to establish that this case involves a substantial question for this Court to consider.

Based on the foregoing, it is apparent that this appeal is not within the jurisdiction of this Court because it is not taken in conformity with 28 USC Section 1257 (2). Additionally, it is not taken in conformity with Rule 15. Failing in these respects, the appeal should be dismissed.

Respectfully submitted,

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